United States Court of Appeals

for the Second Circuit

APPELLEE'S BRIEF

74-1848

IN THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

B

HERBERT GARVEY,

Appellant,

P/S

v.

CASPAR WEINBERGER, SECRETARY,
DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

BRIEF FOR THE APPELLEE

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I N D E X

	Page
Questions Presented	1
Statement of the Case	2
Statutes and Regulations Involved	4
Argument	5
I. The District Court Properly Dismissed Plaintiff's Complaint on the Ground That His Claim for Relief was Moot.	5
A. Plaintiff does not have a present live controversy with defendant.	5
B. Plaintiff's claim does not fall within the exception to the mootness doctrine concerning voluntary cessation of illegal conduct.	7
C. This case does not present an issue capable of repetition, yet evading review.	9
D. Plaintiff's cause of action is not saved from mootness because constitutional issues remain as to unnamed members of plaintiff's class.	15
E. Summary of jurisdictional arguments.	22
II. Plaintiff's Attack on the Constitutionality of 42 U.S.C. § 405(j) does not Raise a Substantial Federal Question, Requiring the Convening of a Three-Judge Court.	23
A. Plaintiff is not deprived of property by payment of his benefits to a representative payee.	23
B. Assuming that plaintiff has been deprived of a property interest by the certification of a representative payee, the procedural protections already available satisfy the requisites of due process.	26

	Page
Conclusion	31
Certificate of Service	32
Statutory and Regulatory Appendix	1a - 16a
Addendum	1b - 5b

CITATIONS

Cases

Anti-Fascist Committee v. McGrath, 341 U.S. 123, 163 (1951)	27
Arnett v. Kennedy, 416 U.S. 134, 164, 168-169, 190 (1974)	24, 25, 27, 28, 29
Bailey v. Patterson, 369 U.S. 31, 32-33, (1962)	16, 22
Baker v. Carr, 369 U.S. 186, 204 (1962)	10
Bell v. Burson, 402 U.S. 535, 539 (1971)	28
Board of Regents v. Roth, 408 U.S. 564, 577 (1972)	24
Boddie v. Connecticut, 401 U.S. 371, 378-379 (1971)	27, 29
Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961)	26
Dawson v. Weinberger, __ F. 2d __, No. 73-1784 (C.A. 4, February 14, 1974)	31
DeFunis v. Odegaard, 416 U.S. 312 (1974)	7, 8, 9, 10
Dunn v. Blumstein, 405 U.S. 330 (1972)	18, 19, 20
Fusari v. Steinberg, __ U.S. __, 43 U.S.L.W. 4121, 4124 (73-848, January 14, 1975)	24, 27
Gaddis v. Wyman, 304 F. Supp. 713 (S.D. N.Y.)	17
Gatling v. Butler, 52 FRD 389 (D. Conn., 1971)	17

Page

Cases Continued:

Geraci v. Treuchtlinger, 487 F. 2d 590 (C.A. 2, 1973) ---------- 17

Goldberg v. Kelly, 397 U.S. 254, 263-264 (1970) ---------- 24, 25, 27, 28

Golden v. Zwickler, 394 U.S. 103, 109-110 (1969) ---------- 6

Goss v. Lopez, __ U.S. __, 43 U.S.L.W. 4181, 4184-4186 (No. 73-898, January 22, 1975) --------- 27, 28

Indiana Employment Security Division v. Burney, 409 U.S. 540 (1973) ---------- 14, 16

Jaffke v. Dunham, 352 U.S. 280 (1957) ---------- 23

LaReu v. Manson, __ F. Supp. __ (D. Conn. 1974) ---- 17

Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941) ---------- 6

Massachusetts v. Mellon, 262 U.S. 447, 488 (1923) ---------- 6

Messer v. Finch, 314 F. Supp. 511 (E.D. Ky. (1970) ---------- 7

Messer v. Richardson, 400 U.S. 987 (1971) ---------- 7

Mitchell v. W. T. Grant Co., 416 U.S. 600, 608-611, 614 (1974) ---------- 27, 29, 30

Moore v. Ogilvie, 394 U.S. 814, 816 (1969) --------- 11, 13

Norman v. Connecticut State Board of Parole, 458 F. 2d 497 (C.A. 2, 1972) ---------- 17

North Carolina v. Rice, 404 U.S. 244 (1971) -------- 5

North Georgia Finishing, Inc. v. Di-Chem, Inc., __ U.S. __, 43 U.S.L.W. 4192, 4194 (No. 73-1121, January 22, 1975) ---------- 30

O'Shea v. Littleton, 414 U.S. 488, 492, 495 (1974) ---------- 6, 15, 16, 22

Page

Cases Continued:

Perry v. Sindermann, 408 U.S. 593 (1972) ---------- 24, 25

Richardson v. Perales, 402 U.S. 389 (1971) --------- 30

Richardson v. Ramirez, 418 U.S. 24, __ (1974) ------ 16, 19, 22

Richardson v. Wright, 405 U.S. 208 (1972) ---------- 30

Roe v. Wade, 410 U.S. 113, 123-125 (1973) ---------- 9, 11, 13

Rosario v. Rockefeller, 410 U.S. 752, 756, n. 5 (1973) ---------- 11

SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972) ---------- 6

Sniadach v. Family Finance Corp., 395 U.S. 337 (1969) ---------- 28

Sosna v. Iowa, __ U.S. __ (43 U.S.L.W. 4125, No. 73-762, January 14, 1975) ---------- 17, 19, 20, 21, 22, 23, 31

Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911) ---------- 9, 10, 13

Storer v. Brown, 415 U.S. 724, 737, n. 8 (1974) ---------- 11

Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122 (1974) ---------- 10, 12, 13

Torres v. Department of Labor, 405 U.S. 949 (1972) ---------- 15

United Public Workers v. Mitchell, 330 U.S. 75, 89-91 (1947) ---------- 6

United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953) ---------- 7, 9

Watkins v. Chicago Housing Authority, 406 F. 2d 1234 (C.A. 7, 1969) ---------- 16

Wyman v. Bowens, 391 U.S. 49 (1970) ---------- 17

Zito v. Weinberger, __ F. Supp. __ (Civ. No. B-74-275, D. Conn., Nov. 15, 1974) ---------- 7, 17

Page

Statutes and Regulations

Social Security Act

42 U.S.C. 402(a) ---------- 2
42 U.S.C. 405(j) ---------- 2, 23
42 U.S.C. 427 ---------- 2
42 U.S.C. 1302 ---------- 2

20 C.F.R. 404.908-404.934 ---------- 3, 26, 30

20 C.F R. 1601-1610 ---------- 2

Miscellaneous

Advisory Committee Note, 39 F.D.R. 69, 105-106 ----- 21

Federal Rules of Civil Procedure
23(c)(3) ---------- 21

3B J. Moore, Federal Practice
¶ 23.10-1, n. 8 (2d ed. 1971 ---------- 16

IN THE UNITED STATES COURT OF APPEALS
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HERBERT GARVEY,

Appellant,

v.

CASPAR WEINBERGER, SECRETARY,
DEPARTMENT OF HEALTH, EDUCATION
AND WELFARE,

Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF VERMONT

BRIEF FOR THE APPELLEE

QUESTIONS PRESENTED

1. Whether plaintiff's challenge to the constitutionality of the Social Security Administration's procedure for appointment of a representative payee is moot because plaintiff has been restored as direct payee of his Social Security benefits.

2. Whether a substantial constitutional issue is presented by a claim that the Secretary's certification, without prior hearing, of payment of Social Security benefits to a representative payee for the beneficiary's use and benefit, violates due process.

STATEMENT OF THE CASE

This appeal is taken by the plaintiff to the United States Court of Appeals for the Second Circuit requesting that the Court of Appeals reverse the order of the United States District Court for the District of Vermont, dated May 31, 1974. The district court in its order dismissed the complaint, denied class action status and denied a three-judge court to consider plaintiff's challenge to the constitutionality of 42 U.S.C. 405(j), 427 and 1302.

Section 205(j) of the Social Security Act, 42 U.S.C. 405(j), provides:

> "When it appears to the Secretary that the interest of an applicant entitled to a payment would be served thereby, certification of payment may be made, regardless of the legal competency or incompetency of the individual entitled thereto, either for direct payment to such applicant, or for his use and benefit to a relative or some other person."

Pursuant to that statute, and implementing regulations, 20 C.F.R. 1601-1610, the Secretary determined that as of December 1, 1973 the Social Security payments [1/] to which plaintiff, Herbert Garvey, was entitled would be paid to his son as his representative. (Plaintiff's First Amended Complaint, at p. 4, ¶7). The Secretary's certification was based upon an application by plaintiff's son, Robert Garvey, accompanied by a physician's certificate indicating that plaintiff

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1/ Plaintiff is entitled to the sum of $134.30 per month in Old Age Insurance Benefits, 42 U.S.C. § 402(a) and $50 per month under the Supplementary Social Security Income Plan. (Plaintiff's First Amended Complaint, at p. 2, ¶7).

was incompetent to manage his own affairs. Although provision is made for a subsequent hearing (20 C.F.R. 404.908-.934), Section 205(j) does not provide for, and the Secretary did not hold, a hearing prior to appointing plaintiff's son as representative payee.

At about this time, plaintiff left his son's home and took up residence with his daughter, Mrs. DeLong. Thereafter, plaintiff's son sought to have Mrs. DeLong substituted as representative payee, but she indicated no desire to take over that responsibility. (Social Security Records introduced as Defendant's Exhibits).

During the period that Robert Garvey was representative payee for his father's Social Security benefits, he endorsed each of plaintiff's Social Security checks and gave them to Mrs. DeLong, who immediately turned them over to plaintiff. Id. Thus, plaintiff continued to receive the full amount of his benefits for his unrestricted use during the time his son was acting as representative payee. There is little evidence as to how plaintiff utilized these monies but plaintiff's daughter observed that although her father " . . . never has money for medicine . . . he hired a taxi the other day to bring him two packs of cigarettes." Id.

On March 8, 1974, plaintiff filed the instant suit to recover his status as direct payee on his Social Security checks, claiming he had been unconstitutionally deprived of that status because a representative payee was appointed without a prior hearing. (Plaintiff's Verified Complaint, at pp. 1-2, ¶ 2-3). Plaintiff originally

sought monetary damages in the amount of the benefits not paid him as direct payee, but, when it became clear he was receiving the proceeds of all his Social Security checks, he amended his complaint, on April 1, 1974, to seek only declaratory and injunctive relief. (Plaintiff's First Amended Complaint, at p. 6).

After being advised that he had a right to ask for reconsideration of the representative payee determination and to submit any additional information that he might desire, plaintiff exercised this right and, on May 22, 1974, he was notified that he had been restored to his status as direct payee. (Exhibit A to Defendant's Motion to Dismiss). This case came for hearing on May 31, 1974, and the district court explained that if plaintiff had, indeed, been restored to his status as direct payee on his benefit checks, then the case should be dismissed as moot. (Transcript of May 31, 1974, Hearing, at pp. 13-14). When it became clear that plaintiff had, in fact, been so restored, the case was dismissed by order of the district court dated May 31, 1974. The district court in that order also held that the plaintiff had failed to establish the prerequisites for a class action, or the convening of a three-judge court. Plaintiff filed a timely notice of appeal.

STATUTES AND REGULATIONS INVOLVED

The relevant statutes and regulations are set forth in a Statutory and Regulatory Appendix to this brief, infra, pp. 1a - 16a.

ARGUMENT

I

THE DISTRICT COURT PROPERLY DISMISSED PLAINTIFF'S COMPLAINT ON THE GROUND THAT HIS CLAIM FOR RELIEF WAS MOOT.

A. Plaintiff does not have a present live controversy with defendant.

The threshold requirement imposed by Article III of the Constitution is that those who seek to invoke the power of a federal court must allege an actual case or controversy.

> "To be cognizable in the Federal Court, a suit must be definite and concrete, touching the legal relations of parties having adverse legal interests. . . . it must be real and substantial controversy admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts. North Carolina v. Rice, 404 U.S. 244 (1971).

Plaintiff no longer has such a "definite and concrete" controversy with the defendant. Plaintiff has been restored to his status as direct payee on his Social Security checks, the relief sought by his complaint. And, plaintiff was not deprived of the use of any of the benefits to which he was entitled during the time that a representative payee was receiving his Social Security checks. Hence, there is no continuing controversy presented over any allegation of injury to property interests which might have been sustained as a result of an allegedly unlawful certification of payment

to a representative payee. Just the fact that plaintiff at one time in the past was exposed to allegedly illegal conduct, does not present a case or controversy justiciable by a Federal Court. O'Shea v. Littleton, 414 U.S. 488, 495 (1974). Nor does the fact that the plaintiff might again be subjected to the allegedly illegal conduct at some time in the future provide the jurisdictional requisite of a case or controversy. Id.; see, SEC v. Medical Committee for Human Rights, 404 U.S. 403 (1972). Plaintiff is now no more likely to experience the appointment of a representative payee, with or without a hearing, than any other Social Security recipient. Hence, his stake in this matter is no greater than that of any other Social Security recipient who fears that some day, for some reason, a representative payee may be appointed as recipient of his benefits. Such a speculative concern clearly does not present a "case or controversy" justiciable in the Federal Courts.

> "Abstract injury is not enough. It must be alleged that plaintiff 'has sustained or is immediately in danger of sustaining some direct injury' as the result of the challenged statute or official conduct. Massachusetts v. Mellon, 262 U.S. 447, 488 (1923). The injury or threat must be 'real and immediate' not 'conjectural' or 'hypothetical'." Golden v. Zwickler, 394 U.S. 103, 109-110 (1969); Maryland Casualty Co. v. Pacific Coal & Oil Co., 312 U.S. 270, 273 (1941); United Public Workers v. Mitchell, 330 U.S. 75, 89-91 (1947), O'Shea, supra, at 494.

See Zito v. Weinberger, __ F. Supp. __ (Civ. No. B-74-275, D. Conn., Nov. 15, 1974).

Because plaintiff is now the direct payee on his benefits and does not claim that he was deprived of any past benefits as a result of the challenged appointment of a representative payee, the dispute as to whether that appointment was lawful is now moot. Messer v. Finch, 314 F. Supp. 511 (E.D. Ky. 1970), vacated and remanded for dismissal as moot, sub nom. Messer v. Richardson, 400 U.S. 987 (1971).

B. Plaintiff's claim does not fall within the exception to the mootness doctrine concerning voluntary cessation of illegal conduct.

The voluntary cessation of the challenged and allegedly illegal conduct on the part of a defendant does not moot a case, otherwise the defendant would be free to return to his old ways. See, e.g., United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953). Plaintiff argues that the voluntary restoration of his status as direct payee of his benefits does not moot his claim for relief.

The Supreme Court considered the 'voluntary cessation' doctrine in DeFunis v. Odegaard, 416 U.S. 312 (1974). There, plaintiff, seeking admission to the law school at the University of Washington, had brought suit alleging that he had been discriminated against on account of his race. He argued that the law school's admissions

policy, which favored minority students, violated his right to equal protection of the law. By the time the case reached the Supreme Court, plaintiff was in his last semester of law school. It was represented to the Court that the law school's policy was that once a student had registered for a semester he was entitled to complete that semester. The State argued that plaintiff, therefore, no longer had a live controversy with the defendants. Whether or not the Court declared that plaintiff's constitutional rights had been violated, he would be able to graduate from law school -- the benefit that he had sought throughout the lawsuit. Plaintiff, in turn, argued that the State had merely voluntarily ceased its illegal conduct. The Court found the case to be moot, observing that "a determination by the Court of the legal issues tendered is no longer necessary to compel [the result sought by plaintiff] and could not serve to prevent it." 416 U.S., at 317. In so doing, the Court sketched the contours of the 'voluntary cessation' doctrine and explained why that doctrine was inapplicable to the case before it.

> "[This] doctrine would be quite relevant if the question had arisen by reason of a unilateral change in the admissions procedures of the Law School, [f]or it was the admissions procedures that were the target of this litigation. * * * But mootness in the present case depends not at all upon a 'voluntary cessation' of the admissions practices that were the subject of this litigation." 416 U.S., at 318.

The case before this Court is analogous. Here, the defendant has not unilaterally changed the challenged regulations concerning

the availability of a prior hearing before appointment of a representative payee. There is no danger that if this case were found moot, defendant would be "free to return to his old ways", W. T. Grant, supra, because defendant has not abandoned those"old ways." Mootness does not here depend upon voluntary cessation of the allegedly illegal conduct around which this dispute revolves. Rather, plaintiff has benefited from a change in his status pursuant to pre-existing and unchallenged regulations and procedures, just as DeFunis benefited from law school's rule allowing him to complete any semester for which he had registered. Finally, a determination by this Court of the legal issue tendered by plaintiff is no longer necessary to compel plaintiff's return to direct payee status, and could not serve to prevent such a change. Accordingly, plaintiff's claim does not present a question of the voluntary cessation of illegal conduct, and is clearly moot.

C. This case does not present an issue capable of repetition, yet evading review.

Plaintiff also alleges that his suit presents an issue "capable of repetition, yet evading review." Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911). The Supreme Court has made it clear, first, that the Southern Pacific doctrine is quite different from the question of voluntary cessation of illegal conduct, see, DeFunis, supra, at 317-319,[2/] and, second, that the Southern Pacific

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2/ Plaintiff's argument tends to meld these two distinct doctrines, Appellant's brief, at 11, despite the fact that they have quite different purposes. Compare, United States v. W. T. Grant Co., 345 U.S. 629, 632 (1953), with Roe v. Wade, 410 U.S. 113, 123-125 (1973).

doctrine is applicable only in an "exceptional situation [to] permit a departure from [t]he usual rule in federal cases . . . that an actual case or controversy must exist at stages of appellate . . . review, and not simply at the date the action is initiated." DeFunis, supra, at 319 (Emphasis added).

The Southern Pacific doctrine is an accommodation of two competing considerations. The first is the jurisdictional imperative for a party seeking relief from a federal court to allege such a "personal stake in the outcome of the controversy as to assure that concrete adverseness which sharpens the presentation of issues upon which the court so largely depends for illumination of difficult constitutional issues." Baker v. Carr, 369 U.S. 186, 204 (1962). The second consideration is to avoid applying the case or controversy requirement so strictly that plaintiffs may be "adversely affected by government 'without a chance of redress'. Southern Pacific Terminal Co. v. ICC, 219 U.S. 498, 515 (1911)." Super Tire Engineering Co. v. McCorkle, 416 U.S. 115, 122 (1974). Accordingly, the contours of the doctrine are defined by its limited purpose -- to insure that judicial review of important issues is not effectively foreclosed where intervening events threaten to invariably moot the plaintiff's claim for relief.

The Southern Pacific doctrine requires the satisfaction of two tests in order to provide an answer to a suggestion of mootness. First, the claimed deprivation must be capable of repetition, and,

second, the issue presented must, but for the application of the doctrine, be likely to evade review. A brief discussion of the recent cases in which the Supreme Court has applied the Southern Pacific doctrine will demonstrate the meaning of the crucial second prong of this test.

In Roe v. Wade, 410 U.S. 113 (1973), the Supreme Court held that a continuing controversy over the constitutionality of Texas' abortion laws existed as to a named plaintiff who was pregnant when the suit was filed, even though she may not have been pregnant at later stages of the appeal. The Court concluded that the case provided a classic example of an issue "capable of repetition, yet evading review," hence the termination of plaintiff's pregnancy while the case was on appeal did not render it moot -- even though a woman whose pregnancy has ended is no more effected by the abortion laws than one who was not pregnant at the time suit was filed. 3/ "[T]he . . . human gestation period is so short that . . . pregnancy will come to term before the usual appellate process is complete. If that termination makes a case moot, . . . appellate review will be effectively denied." 410 U.S., at 125.

In Moore v. Ogilvie, 394 U.S. 814, 816 (1969), the Supreme Court concerned itself with the problem of mootness in voting rights cases, a common area for the application of the Southern Pacific doctrine. 4/ Ogilvie was an appeal from a decision denying relief to

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3/ A woman who was not pregnant at the time the suit was filed was determined not to have standing to challenge the constitutionality of Texas' abortion laws. 410 U.S., at pp. 127-129.

4/ See, e.g., Storer v. Brown, 415 U.S. 724, 737, n. 8 (1974); Rosario v. Rockefeller, 410 U.S. 752, 756, n. 5 (1973).

plaintiffs who had unsuccessfully sought to be certified as independent candidates for presidential elector on the 1968 ballot. Appellants asserted that the Illinois certification requirement violated the constitutional obligation not to discriminate against voters in less populous counties. By the time the appeal reached the Supreme Court, the 1968 Election had already taken place, but the Court held the case was not moot because "while the 1968 Election is over, [the challenged burden] remains to control future elections . . ." and the short span of time between the denial of certification for candidacy and actual balloting threatened to moot all future attacks on the questioned candidacy requirement. 394 U.S., at 816.

Finally, Super Tire Engineering Co. v. McCorkle, 416 U.S. 115 (1974), concerned whether there was an issue capable of repetition, yet evading review, presented in a lawsuit brought by employers challenging the provision of State welfare benefits to their striking workers. Before the case was tried, the strike giving rise to the controversy ended, the striking employees went back to work, and the question of their eligibility for welfare benefits appeared to have been mooted. A closely divided Court held the case not to be moot. The Court noted that the question presented was capable of repetition, and, more importantly, "the great majority of economic strikes do not last long enough for complete judicial review of the controversies they engender," hence the issue was likely to evade full appellate review. 416 U.S., at 126. 5/

5/ The dissent, in arguing that the case was moot, focused on the issue of whether the issue presented really was likely to "evade review." 416 U.S., at 131 (Stewart, J., dissenting).

There is a common thread running through these cases -- in each the challenged statute or policy would continue to be applied but the plaintiff's claim would inevitably mature into mootness pending resolution of the lawsuit. In Roe, the termination of pregnancy, in Ogilvie the occurrence of an election, and in Super Tire the end of an economic strike, would inevitably deprive the plaintiff of a continuing controversy over the application of the challenged statute, leaving them adversely affected "without a chance of redress." Southern Pacific, supra, at 515. In each instance, the mere passage of time threatened to insulate a constitutional deprivation from judicial review, and it is that danger which served as the raison d'etre for rejecting suggestions of mootness. Thus, it is only where an invalid statute would continue to be applied simply because judicial review of a live controversy involving the named plaintiff was invariably foreclosed, that the issue would be "capable of repetition, yet evading review."

The case before us clearly is not one which presents an issue likely to evade review. The claim raised in this case does not concern a time-related deprivation. This is not a situation where by the time a case is resolved in the courts, it will always be too late to grant the named plaintiff relief. There is no reason to believe that every Social Security beneficiary for whom a representative payee has been appointed will be returned to direct payee status during the pendency of his lawsuit. Moreover, there may well be cases in which the beneficiary for whom a representative payee has been appointed will

have a continuing claim arising from the failure of the representative payee to afford the beneficiary the use of the monies to which he is entitled.

The case of Indiana Employment Security Division v. Burney, 409 U.S. 540 (1973), is instructive. There the Supreme Court considered a challenge to the termination of unemployment insurance benefits without a prior hearing. By the time the case reached the Supreme Court, the only named class representative had already received a post-termination hearing at which she obtained a reversal of the initial determination of ineligibility and full retroactive benefits. The Court, focusing only on that named plaintiff, 6/ remanded the case for consideration of mootness. Obviously, the Court did not consider the alleged constitutional deprivation incapable of repetition, even as to the named plaintiff. Rather, it appeared that the prior hearing issue was not one which would evade review. A post-termination hearing, afforded as a matter of course, would not inevitably moot every claim for relief from the denial of a prior hearing. If the post-termination hearing did not result in the award of retroactive payments, as it had in Burney's case, a live and continuing controversy would be presented as to the insured's claim to the benefits allegedly wrongfully withheld pending the post-termination hearing. A case had already come to the Supreme Court in such a posture, and the Court had summarily affirmed the judgment of

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6/ See p. 16, infra.

the three-judge court. Torres v. Department of Labor, 405 U.S. 949 (1972). Similarly, the issue of whether a Social Security beneficiary is entitled to a prior hearing before a representative payee is appointed may well be presented in contexts where the case will not become moot pending complete judicial consideration of the constitutional claim asserted. This case does not, therefore, satisfy the requirements of the Southern Pacific doctrine.

D. Plaintiff's cause of action is not saved from mootness because constitutional issues remain as to unnamed members of plaintiff's class.

Plaintiff asserts that even if the case is moot as to himself, it is not moot as to unnamed members of the class he sought, in the district court, to represent. It is true that there are unnamed members of that class who are suffering a 'concrete' injury as a result of challenged procedures providing for the appointment of a representative payee without a prior hearing. The issue is whether the controversy between these unnamed plaintiffs and the Secretary presents a case or controversy cognizable by a Federal Court.

The Supreme Court has repeatedly observed that the general rule of Federal jurisdiction is that the named plaintiffs must satisfy the threshold requirement imposed by Article III of the Constitution -- that "those who seek to invoke the power of the Federal Courts must allege an actual case or controversy." O'Shea v. Littleton, 414 U.S. 488, 492 (1974). Applying this requirement to class actions, the Court has observed that:

> "[I]f none of the named plaintiffs purporting to represent a class establishes the requisite of a case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class. Bailey v. Patterson, 369 U.S. 31, 32-33 (1962); Indiana Employment Division v. Burney, 409 U.S. 540 (1973); See 3B J. Moore, Federal Practice, ¶ 23.10-1, n. 8 (2d ed. 1971)." O'Shea, supra, at 494-5.

The Supreme Court specifically considered the need for the named plaintiff to retain a live case or controversy in order to save a case from mootness in Indiana Employment Division v. Burney, supra. Considering a challenge to the lack of a hearing prior to the termination of unemployment benefits, the Court remanded the case for considerations of mootness because the only named class representative had obtained a reversal of the initial determination of her ineligibility and received retroactive compensation. The Court observed that "though [she] purports to represent a class of all present and future recipients of unemployment insurance, there are no named representatives of the class except Mrs. Burney, who has been paid." 409 U.S., at 541. Application of the general rule would thus seem to require the Court to determine that once plaintiff's controversy is moot, it is inappropriate to look to unnamed members of his putative class, since "[I]n the Federal system one may not represent a class of which he is not a part." Richardson v. Ramirez, 418 U.S. 24, __ (1974); See, Watkins v. Chicago Housing Authority, 406 F. 2d 1234 (C.A. 7, 1969).

The rule of this Circuit appears to be that an action cannot proceed as a class action when the only named plaintiff's claims have become moot. Although in Gatling v. Butler, 52 FRD 389 (D. Conn. 1971), the district court suggested that a named plaintiff whose own claim is moot might continue to represent a class,[7/] that notion appears to have been put to rest by this Circuit's decision in Norman v. Connecticut State Board of Parole, 458 F. 2d 497 (C.A. 2, 1972); see Geraci v. Treuchtlinger, 487 F. 2d 590 (C.A. 2, 1973); Zito v. Weinberger, ___ F. Supp. ____ (Civil No. B-74-275, D. Conn., Nov. 15, 1974); LaReu v. Manson, ___ F. Supp. ___ (D. Conn. 1974).

The Supreme Court has, however, recently recognized a very limited exception to the doctrine that it is inappropriate to look to an unnamed class member to find a "case or controversy" satisfying the requisites of Article III. In Sosna v. Iowa, ___ U.S. ___, (43 U.S.L.W. 4125 (No. 73-762, January 14, 1975), the Court upheld Iowa's one-year durational residency requirement for securing a divorce in the Courts of that State. The district court had certified the case as a class action and upheld the constitutionality of the challenged statute. By the time the appeal reached the Supreme Court, the only named plaintiff had satisfied the durational residency requirement and had obtained a divorce, suggesting the possibility that the case had become moot. The Court rejected the suggestion of mootness, holding that a

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7/ Gaddis v. Wyman, 304 F. Supp. 713 (S.D. N.Y.), aff'd sub nom. Wyman v. Bowens, 319 U.S. 49 (1970), relied on plaintiff to support this proposition, is inapposite because, in that case, unnamed class members intervened to save the case from being dismissed as moot.

controversy remained alive as to the class of unnamed persons whom the named plaintiff represented and who, upon certification of the class action, acquired a legal status separate from plaintiff's own asserted interests.

This exception to the mootness doctrine can be traced back to the Supreme Court's decision in Dunn v. Blumstein, 405 U.S. 330 (1972). The Court there struck down Tennessee's durational residency requirement for voting. The suit had been brought to compel the registration of the named plaintiff and the members of the class he represented in order that they might participate in an election scheduled for August 6, 1970. The Federal District Court did not order preliminary relief in time for the August election. By the time of the next election, the named plaintiff would have met the challenged 3-month County residency requirement. The district court nonetheless rejected the State's argument that the controversy over that requirement was moot. By the time the appeal reached the Supreme Court, the only named plaintiff had also satisfied the challenged one-year State residency requirement. The Court nonetheless reached the merits, observing that "[a]lthough the appellee [the only named plaintiff] can now vote, the problem to voters posed by the Tennessee residence requirement is capable of repetition, yet evading review." 405 U.S., at 333, n. 2. The Supreme Court held that although the named plaintiff had satisfied the challenged residency requirements and would no longer be disenfranchised thereby, the case was not moot. Apparently, applying the Southern Pacific rationale to a class action, the Court found that the

challenged requirement remained applicable to unnamed class members and unless the Court looked to their interests, the issue presented was likely to evade review entirely. Obviously the mere passage of a few months would invariably have rendered moot a challenge to the residency requirement by any individual named plaintiff -- threatening to virtually foreclose judicial review of the claimed constitutional deprivation.

Mr. Justice Marshall, the author of Dunn, clarified its significance for the application of the Southern Pacific doctrine to class actions in his dissent in Richardson v. Ramirez, 418 U.S. 24, __ (1974). Mr. Justice Marshall noted that the rationale of the Southern Pacific doctrine required a limited exception to the usual rule that one may not represent a class of which he is not a part, when an invalid statute would continue to be applied simply because judicial review of a controversy involving the named plaintiff would invariably be foreclosed by the passage of time, yet the issue would be capable of repetition as to unnamed class members. In such circumstances, the Court should prevent the alleged deprivation from being insulated from judicial review by looking to those unnamed class members to provide a case or controversy. 418 U.S., at ___.

Mr. Justice Marshall's reasoning was adopted by the Court in Sosna v. Iowa, supra. The Court there observed that the case before it was "one in which state officials will undoubtedly continue to

enforce the challenged statute and yet, because of the passage of time, no single challenger [would] remain subject to its restrictions for the period necessary to see such a lawsuit to its conclusion." 43 U.S.L.W., at 4127. Referring to Dunn v. Blumstein, supra, the Court observed that in a case, "in which, . . . the issue sought to be litigated escapes full appellate review at the behest of any single challenger, [the controversy] does not inexorably become moot by the intervening resolution of the controversy as to the named plaintiffs. . . . [H]owever, . . . the same exingency that justifies this doctrine serves to identify its limits. In cases in which the alleged harm would not dissipate during the normal time required for resolution of the controversy, the general principles of Art. III jurisdicition require that the plaintiff's personal stake in litigation continue throughout the entirety of the litigation." 43 U.S.L.W., at 4128. (Citations omitted). Accordingly, the Court did not abrogate the general rule requiring the named plaintiff to have a continuing case or controversy, but merely established a limited exception for those cases in which the named plaintiffs' claim would inevitably mature into mootness pending resolution of the lawsuit, because:

> "A blanket rule under which a class action challenge to a short durational residency requirement would be dismissed upon the intervening mootness of the named representative's dispute would permit a significant class of federal claims to remain unredressed for want of a spokesman who could retain a personal adversary position throughout the course of the litigation." 43 U.S.L.W., at 4128, n. 9.

Plaintiff's claim clearly does not fall within this limited exception to the general requirement of a continuing live controversy between the named plaintiff and defendant. The case does not concern a time-based deprivation, such as a short durational residency requirement. The alleged harm will not dissipate in every case during the normal time required for resolution of the controversy before the Courts. Accordingly, the general principles of Article III jurisdiction must still apply, requiring that the named plaintiff in this case allege a definite and concrete injury. Here, however, plaintiff had no such personal stake in the controversy at the time the district court dismissed his complaint. See pp. 5-7, supra.

Sosna, supra, also requires that the class must be certified before a class action can be maintained by a named plaintiff whose own claim has become moot. The Court observed in Sosna that when the district court certified the class action, the class of unnamed persons described in the certification acquired a legal status separate from the interests asserted by the plaintiff. 43 U.S.L.W., at 4127; see, e.g. F.R.C.P. 23(c)(3); Advisory Committee Note, 39 FRD 69, 105-106. The Court considered that legal status of unnamed class members to save the case from mootness. Id. No such certification has taken place in this case, hence the legal status and interests of unnamed class members have not taken on that independent vitality considered essential to the existence of a continuing case or controversy in Sosna.

In Sosna, the Court did avert to a situation in which ". . . the controversy involving the named plaintiffs is such that it becomes moot as to them before the District Court can reasonably be expected to rule on a certification motion . . . ." 43 U.S.L.W., at 4128, n. 11. The Court observed that in such instances certification may be made to relate back to the filing of the complaint, but warned that this is appropriate only where there is a very real likelihood that, otherwise, the issue presented would evade review. As discussed above, there is no such likelihood in this case. Accordingly, it is clear that certification of the class action after plaintiff had ceased to be a member of the class which he sought to represent would have been inappropriate, [8/] and certification not having taken place, the unnamed members of the class could not be looked to for a continuing case or controversy to satisfy Article III.

E. Summary of jurisdictional arguments.

As the district court's memorandum opinion indicates, plaintiff has received all of the proceeds of his Social Security checks and has been restored to his status as direct payee of those benefits. The Court concluded that "since it appears that the plaintiff is no longer aggrieved by the action on the part of the defendant [Secretary] upon which his complaint is founded, the complaint is dismissed . . . ." Because plaintiff's individual claim is moot, for reasons other than a voluntary cessation of the challenged conduct, and because this case does not present an issue "capable of repetition, yet evading review"

8/ Sosna, supra, 43 U.S.L.W., at 4128; Richardson v. Ramirez, supra, at ___ ; O'Shea v. Littleton, supra, at 494; Bailey v. Patterson, 309 U.S. 31, 32-33 (1962).

either as to plaintiff or the members of the class he sought to represent, the district court's dismissal of the complaint was proper. Moreover, since plaintiff is not a member of the class he sought to represent and this case does not fall within the Sosna exception, the district court properly refused to certify it as a class action. The complaint was thus properly dismissed.

II

PLAINTIFF'S ATTACK ON THE CONSTITUTIONALITY OF 42 U.S.C. § 405(j) DOES NOT RAISE A SUBSTANTIAL FEDERAL QUESTION, REQUIRING THE CONVENING OF A THREE-JUDGE COURT.

Assuming the case is not moot, we now demonstrate that plaintiff's complaint did not present a substantial constitutional question. Accordingly, the judgment of the district court may be affirmed on that basis. See Jaffke v. Dunham, 352 U.S. 280 (1957).

A. Plaintiff is not deprived of property by payment of his benefits to a representative payee.

Plaintiff contends that the constitutional guarantee of due process requires a hearing prior to the Secretary's initial determination under 42 U.S.C. § 405(j) that a representative payee should be appointed as recipient of a beneficiary's Social Security checks. The applicability of procedural due process protections to that determination depends, in the first instance, on whether plaintiff has a property interest in his Social Security benefits within the meaning

of the Fifth Amendment. The Supreme Court has broadly defined "property" for this purpose in several recent cases. In Board of Regents v. Roth, 408 U.S. 564, 577 (1972), the Court explained that:

> "To have a property interest in a benefit a person must, . . . have a legitimate claim of entitlement to it. It is the purpose of the institution of property to protect those claims upon which people rely in their daily lives, reliance that must not be arbitrarily undermined."

In a companion case, Perry v. Sindermann, 408 U.S. 593 (1972), the Court found a protectable property interest in a college professor's tenure at a public educational institution. Similarly, a majority of the Court found a protectable property interest in the statutory guarantee of federal employment absent cause for dismissal. Arnett v. Kennedy, 416 U.S. 134, 164 (1974)(Powell, J., joined by Blackmun, J., concurring); Id., at 171 (White, J., concurring in part and dissenting in part); Id., at 206 (Marshall, J., joined by Douglas, J., and Brennan, J., dissenting). Perhaps the case closest to the mark, however, is a case which preceded Roth. In Goldberg v. Kelly, 397 U.S. 254 (1970), the Supreme Court held that a protectable property interest was involved in the termination of welfare benefits. On the basis of the decision in Goldberg, it would appear that plaintiff does, indeed, have a protectable property interest in the Old Age Insurance benefits to which it has already been determined he is entitled. See Fusari v. Steinberg, __ U.S. __, 43 U.S.L.W. 4121 (No. 73-848, January 14, 1975).

Although it is conceded that plaintiff has a property interest in the receipt of his Social Security benefits, the question remains whether he has, in fact, been deprived of that property interest by the appointment of a representative payee. It is only the taking of plaintiff's property, no matter how temporary, that can bring into play the procedural protections of the due process clause. In each of the cases in which the Supreme Court has applied procedural due process protections, the deprivation was absolute, even if temporary. For example. Goldberg v. Kelly, supra, involved the termination of welfare benefits; Perry v. Sindermann, supra, involved the termination of employment of a college teacher; and Arnett v. Kennedy, supra, involved the dismissal of a public employee. In each case, the recipient was to be totally deprived of the benefit at issue. This is not such a case. On the contrary, plaintiff, or those situated like him, would continue to receive the use and benefit of their Social Security checks despite the appointment of a representative payee. The only effect of the certification of a representative payee is to change the mechanism for payment in order to insure that the funds to which plaintiff is entitled are available for his use without diminution. The conservation of recipient's property interest affected by the appointment of a representative payee stands in stark contrast to the actual deprivation of property in the cases relied on by plaintiff. Thus, even if plaintiff does have a property interest in his Social Security benefits which is cognizable under the Fifth Amendment, there has been no deprivation of that property requiring the application of due process protections.

B. Assuming that plaintiff has been deprived of a property interest by the certification of a representative payee, the procedural protections already available satisfy the requisites of due process.

Although the Secretary may certify payment to a representative payee without a prior hearing, the Secretary's regulations grant claimants, such as plaintiff, the right to a full evidentiary hearing on Administrative appeal (20 C.F.R. 404.908-.934). The regulations governing the evidentiary hearing are reproduced in the Statutory and Regulatory Appendix, infra. at 9a . Accordingly, the issue presented by this lawsuit is not whether petitioner is entitled to a hearing at some time before the alleged deprivation of property becomes final, but only whether he is entitled to such a hearing before the appointment of representative payee takes place. Assuming that the appointment of a representative payee is, in fact, a deprivation of property for purposes of the Fifth Amendment, it is clear that the availability of a full evidentiary hearing after certification of payment to the representative payee is sufficient to satisfy the requisites of the constitutional guarantees of due process.

The means for determining what procedural due process protections attach to a particular governmental action were described in Cafeteria & Restaurant Workers Union v. McElroy, 367 U.S. 886, 895 (1961):

> "[C]onsideration of what procedures due process may require under any given set of circumstances must begin with the determination of the precise nature of the government function involved as well as of the private interest that has been affected by governmental action." 367 U.S., at 895, quoted with approval in Goldberg v. Kelly, supra, at 263.

Since that time, the Court has continued to apply a balancing test to reach a constitutional accommodation of the conflicting private and governmental interests at stake where due process procedural protections are to be applied. Mitchell v. W. T. Grant Co., 416 U.S. 600, 607 (1974); Accord, Goss v. Lopez, __ U.S. __, 43 U.S.L.W. 4181, 4185 (No. 73-898, January 22, 1975); Fusari v. Steinberg, __ U.S. __, 43 U.S.L.W. 4121, 4124 (No. 73-848, January 14, 1975); Arnett v. Kennedy, supra; Boddie v. Connecticut, 401 U.S. 371, 378 (1971); see Anti-Fascist Committee v. McGrath, 341 U.S. 123, 163 (1951)(Frankfurter, J., concurring).

The Supreme Court has described the usual rule as being that "[w]here only property rights are involved, mere postponement of [a full hearing] is no denial of due process . . . ." Mitchell v. W. T. Grant Co., 416 U.S., at 611, and there is certainly no absolute requirement that a hearing be held prior to the deprivation where there is a strong government interest in summary adjudication. E.g., Goss v. Lopez, 43 U.S.L.W., at 4186.

In Goldberg v. Kelly, supra, the Court determined that a hearing was required before welfare benefits could be terminated. In explaining why a prior hearing was necessary, the Court explained that:

> "[T]he crucial factor in this context . . . is that termination of aid pending resolution of a controversy over eligibility may deprive an eligible recipient of the very means by which to live while he waits." 397 U.S., at 264.

The Court has elsewhere emphasized that the impact on the claimants of the challenged deprivation of property rights is an essential consideration in determining whether a prior hearing is required. For example, in Sniadach v. Family Finance Corp., 395 U.S. 337 (1969), the Court required a hearing before garnishment of wages because of ". . . the tremendous hardship [imposed] on wage earners with families to support . . ." by the garnishment of their wages. 395 U.S., at 341. See also Mitchell, supra, at 618; Arnett, supra, at 168-169 (Powell, J., concurring) and 190 (White, J., concurring and dissenting). See also Bell v. Burson, 402 U.S. 535, 539 (1971)(requiring a hearing before suspension of a driver's license, the possession of which " . . . may become essential in pursuit of a livelihood"); Goss v. Lopez, 43 U.S.L.W., at 4184 (requiring an informal hearing for suspension from public school because " . . . education is perhaps the most important function of State and local governments"). Plaintiff, in this case, is not being really deprived of the benefit of his property while he awaits a full hearing and he is surely not being deprived "of the

very means by which to live while he waits." To the contrary, the reason that payment is being certified to a representative payee is to insure that plaintiff's benefits will be used and available for him pending the hearing. The loss to the plaintiff of having to receive his Social Security payments through a representative payee rather than receiving them directly pending the administrative hearing is simply not a "grievous loss" which outweighs the government's substantial interest in summary adjudication.

The government's interest in such summary adjudications are indeed overwhelming. See Mitchell v. W. T. Grant Co., supra, at 608; Arnett v. Kennedy, supra, at 168-169 (Powell, J., concurring) and 192-194 (White, J., concurring and dissenting); cf. Id., at 223-226 (Marshall, J., dissenting). The government has a significant interest in assuring that Social Security payments are not dissipated by mentally incompetent claimants pending a hearing on whether a representative payee should be appointed as recipient of those benefits. 9/ This interest is best served by permitting the Secretary to act promptly, on the basis of an adequate showing, to conserve a claimant's funds. This is clearly a situation "where some valid governmental interest is at stake that justifies postponing the hearing." Boddie v. Connecticut, 401 U.S. 371, 379 (1971).

9/ To the extent the risk of leaving the property in the hands of the party asserting the right to a prior hearing is a relevant consideration, it surely militates in favor of allowing for a summary procedure prior to certification of payment to a representative payee. See Mitchell v. W. T. Grant Co., 416 U.S., at 608-609; Arnett v. Kennedy, 416 U.S., at 190 (White, J., concurring and dissenting).

A final factor militating in favor of not requiring a hearing prior to the appointment of a representative payee is the availability of a prompt hearing subsequent to such appointment. (20 C.F.R. 404.908-.934). The availability of a prompt subsequent hearing was considered crucial in North Georgia Finishing, Inc. v. Di-Chem, Inc., __ U.S. __, 43 U.S.L.W. 4192, 4194 (No. 73-1121, January 22, 1975); Id., at 4196 (Powell, Jr., concurring); See Mitchell, supra at 610 and 614.

As the Supreme Court observed in Richardson v. Wright, 405 U.S. 208 (1972):

> "In the context of a comprehensive complex administrative program, the administrative process must have a reasonable opportunity to evolve procedures to meet needs as they arise."

Cf., Richardson v. Perales, 402 U.S. 389 (1971). The procedures adopted by the Secretary for the appointment of a representative payee reflect a reasonable balancing of the private and governmental interests. They permit the Secretary to immediately certify payment to a representative payee when presented with probative evidence of incompetence, while at the same time affording the claimant an early opportunity to contest the Secretary's action at a full evidentiary hearing. Accordingly, in the only appellate decision concerning a claim that the challenged representative payee regulations violate due process guarantees because they do not provide for a prior hearing, the Court of Appeals for the Fourth Circuit affirmed a District Judge's order dismissing the complaint and refusing to convene a three-judge court. The Fourth Circuit held that the challenged statute and regulations accord with due process and

present no substantial constitutional issue. Dawson v. Weinberger, __ F. 2d ___, No. 73-1784 (C.A. 4, February 14, 1974). (A copy of that decision is reproduced as an Addendum at pp. 1b - 5b, infra).

In sum, plaintiff has not presented a real and substantial controversy admitting of specific relief through a decree of conclusive character, as is required by Article III as pre-condition to invocation of the power of a federal court. Plaintiff's own claim is clearly moot and he has not satisfied the requirements dictated by the Supreme Court in Sosna v. Iowa, for looking to unnamed class members to satisfy the requisites of Article III. Accordingly, the district court properly dismissed this lawsuit. However, even if this Court should determine that plaintiff's case was not moot and that the court below had jurisdiction to adjudicate his claim for relief, the district court's judgment dismissing the complaint must nonetheless be affirmed because plaintiff did not present a substantial constitutional issue by his assertion that the Secretary's certification of payment of plaintiff's Social Security benefits to a representative payee, without a prior hearing, violated the Fifth Amendment's guarantee of due process.

CONCLUSION

For the foregoing reasons, the judgment of the district court should be affirmed.

Respectfully submitted,

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FEBRUARY, 1975

CERTIFICATE OF SERVICE

I hereby certify that on this 3rd day of February, 1975, I served copies of the foregoing Brief for the Appellee upon counsel of record by causing two copies to be mailed, postage prepaid, to:

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STATUTORY AND REGULATORY

APPENDIX

42 U.S.C. Sections 405(j), 427 and 1302 provide:

(j) Direct or indirect certification.

When it appears to the Secretary that the interest of an applicant entitled to a payment would be served thereby, certification of payment may be made, regardless of the legal competency or incompetency of the individual entitled thereto, either for direct payment to such applicant, or for his use and benefit to a relative or some other person.

§ 427. Transitional insured status for purposes of old-age and survivors insurance benefits.

(a) In the case of any individual who attains the age of 72 before 1969 but who does not meet the requirements of section 414(a) of this title, the 6 quarters of coverage referred to in so much of paragraph (1) of section 414(a) of this title as follows clause (C) shall, instead, be 3 quarters of coverage for purposes of determining entitlement of such individual to benefits under section 402(a) of this title, and of his wife to benefits under section 402(b) of this title, but, in the case of such wife, only if she attains the age of 72 before 1969 and only with respect to wife's insurance benefits under section 402(b) of this title for and after the month in which she attains such age. For each month before the month in which any such individual meets the requirements of section 414(a) of this title, the amount of his old-age insurance benefit shall, notwithstanding the provisions of section 402(a) of this title, be $46 and the amount of the wife's insurance benefit of his wife shall, notwithstanding the provisions of section 402(b) of this title, be $23.

(b) In the case of any individual who has died, who does not meet the requirements of section 414(a) of this title, and whose widow attains age 72 before 1969, the 6 quarters of coverage referred to in paragraph (3) of section 414(a) of this title and in so much of paragraph (1) thereof as follows clause (C) shall, for purposes of determining her entitlement to widow's insurance benefits under section 402(e) of this title, instead be—

(1) 3 quarters of coverage if such widow attains the age of 72 in or before 1966,

(2) 4 quarters of coverage if such widow attains the age of 72 in 1967, or

(3) 5 quarters of coverage if such widow attains the age of 72 in 1968.

The amount of her widow's insurance benefit for each month shall, notwithstanding the provisions of section 402(e) of this title (and section 402(m) of this title), be $46.

(c) In the case of any individual who becomes, or upon filing application therefor would become, entitled to benefits under section 402(a) of this title by reason of the application of subsection (a) of this section, who dies, and whose widow attains the age of 72 before 1969, such deceased individual shall be deemed to meet the requirements of subsection (b) of this section for purposes of determining entitlement of such widow to widow's insurance benefits under section 402(e) of this title. (Aug. 14, 1935, ch. 531, title II, § 227, as added July 30, 1965, Pub. L. 89-97, title III, § 309(a), 79 Stat. 379, and amended Jan. 2, 1968, Pub. L. 90-248, title I, § 102(a), 81 Stat. 827; Dec. 30, 1969, Pub. L. 91-172, title X, § 1003(a), 83 Stat. 740.)

AMENDMENTS

1969—Subsec. (a). Pub. L. 91-172, § 1003(a)(1), substituted "$46" for "$40", and "$23" for "$20".

Subsec. (b). Pub. L. 91-172, § 1003(a)(2), substituted "$46" for "$40".

1968—Subsec. (a). Pub. L. 90-248, § 102(a)(1), substituted "$40" for "$35" and "$20" for "$17.50".

Subsec. (b). Pub. L. 90-248, § 102(a)(2), substituted "$40" for "$35".

EFFECTIVE DATE OF 1969 AMENDMENT

Section 1003(c) of Pub. L. 91-172 provided that: "The amendments made by subsections (a) and (b) [amending this section and section 428 of this title] shall apply with respect to monthly benefits under title II of the Social Security Act [this subchapter] for months after December 1969."

EFFECTIVE DATE OF 1968 AMENDMENT

Section 102(c) of Pub. L. 90-248 provided that: "The amendments made by subsections (a) and (b) [to subsecs. (a) and (b) of this section and to section 428(b)(1), (2), (c)(2), (2)(A), and (3)(B) of this title] shall apply with respect to monthly benefits under title II of the Social Security Act [this subchapter] for months after January 1968."

EFFECTIVE DATE

Section 309(b) of Pub. L. 89-97 provided that: "The amendment made by subsection (a) [adding this section] shall apply in the case of monthly benefits under title II of the Social Security Act [this subchapter] for and after the second month following the month [July 1965] in which this Act [Pub. L. 89-97] is enacted on the basis of applications filed in or after the month [July 1965] in which this Act [Pub. L. 89-97] is enacted."

SECTION REFERRED TO IN OTHER SECTIONS

This section is referred to in title 20 section 880b-2.

§ 1302. Rules and regulations.

The Secretary of the Treasury, the Secretary of Labor, and the Secretary of Health, Education, and Welfare, respectively, shall make and publish such rules and regulations, not inconsistent with this chapter, as may be necessary to the efficient administration of the functions with which each is charged under this chapter. (Aug. 14, 1935, ch. 531, title XI, § 1102, 49 Stat. 647; 1946 Reorg. Plan No. 2, §§ 1, 4, eff. July 16, 1946, 11 F.R. 7873, 60 Stat. 1095; 1949 Reorg. Plan No. II, § 1, eff. Aug. 20, 1949, 14 F.R. 5225, 63 Stat. 1065; 1950 Reorg. Plan No. 19, § 1, eff. May 24, 1950, 15 F.R. 3178, 64 Stat. 1271; Aug. 28, 1950, ch. 809, title IV, § 403(c), 64 Stat. 559; 1953 Reorg. Plan No. 1, §§ 5, 8, eff. Apr. 11, 1953, 18 F. R. 2053, 67 Stat. 631.)

CODIFICATION

Provisions relating to the Secretary of Labor were inserted in view of 1950 Reorg. Plan No. 19, which transferred the Bureau of Employees' Compensation from the Federal Security Agency to the Department of Labor and the functions of the Federal Security Administrator with respect to the Bureau and to employees' compensation, including workmen's compensation, to the Secretary of Labor. See transfer of functions notes below.

REPEALS

The provisions of this section were incorporated into sections 1429 and 1609 of Title 26, I. R. C. 1939, by act Feb. 10, 1939, ch. 2, 53 Stat. 1. Section 4 of the act of Feb. 10, 1939, provided that all laws and parts of laws codified into the I. R. C. 1939, to the extent that they related exclusively to internal revenue, were repealed. Provisions of I. R. C. 1939 were generally repealed by section 7851 of Title 26, I. R. C. 1954. See also, section 7807 of said Title 26, I. R. C. 1954, respecting rules in effect upon enactment of I. R. C. 1954. The repealed sections are now covered by section 7805 (a), (c) of Title 26 I. R. C. 1954.

TRANSFER OF FUNCTIONS

All functions of the Federal Security Administrator were transferred to the Secretary of Health, Education, and Welfare and all agencies of the Federal Security Agency were transferred to the Department of Health, Education, and Welfare by section 5 of 1953 Reorg. Plan No. 1, set out in the Appendix to Title 5, Government Organization and Employees. The Federal Security Agency and the office of Administrator were abolished by section 8 of 1953 Reorg. Plan No. 1.

"Administrator" was substituted for "Board" by act Aug. 28, 1950.

The Bureau of Employees' Compensation of the Federal Security Agency, together with its functions, was transferred to the Department of Labor to be administered under the direction and supervision of the Secretary of Labor by section 1 of 1950 Reorg. Plan No. 19, formerly set out in the Appendix to Title 5.

The Bureau of Employment Security of the Federal Security Agency, together with its functions, was transferred to the Department of Labor, to be administered by the Secretary of Labor, by section 1 of 1949 Reorg. Plan No. II, set out in the Appendix to Title 5.

"Federal Security Administrator" was substituted for "Secretary of Labor" and "Social Security Board" by 1946 Reorg. Plan No. 2. See note under section 902 of this title.

20 C.F.R. Sections 404.1601 through 404.1610 provide:

§ 404.1601 Payments on behalf of an individual.

When it appears to the Administration that the interest of a beneficiary entitled to a payment under title II of the Act would be served thereby, certification of payment may be made by the Administration, regardless of the legal competency or incompetency of the beneficiary entitled thereto, either for direct payment to such beneficiary, or for his use and benefit to a relative or some other person as the "representative payee" of the beneficiary. When it appears that an individual who is receiving benefit payments may be incapable of managing such payments in his own interest, the Administration shall, if such individual is age 18 or over and has not been adjudged legally incompetent, continue payments to such individual pending a determination as to his capacity to manage benefit payments and the selection of a representative payee.

[35 F.R. 11698, Sept. 22, 1970]

§ 404.1602 Submission of evidence by representative payee.

Before any amount shall be certified for payment to any relative or other person as representative payee for and on behalf of a beneficiary, such relative or other person shall submit to the Administration such evidence as it may require of his relationship to, or his responsibility for the care of, the beneficiary on whose behalf payment is to be made, or of his authority to receive such payment. The Administration may, at any time thereafter, require evidence of the continued existence of such relationship, responsibility or authority. If any such relative or other person fails to submit the required evidence within a reasonable period of time after it is requested, no further payments shall be certified to him on behalf of the beneficiary unless for good cause shown, the default of such relative or other person is excused by the Administration, and the required evidence is thereafter submitted.

§ 404.1603 Responsibility of representative payee.

A relative or other person to whom certification of payment is made on behalf of a beneficiary as representative payee shall, subject to review by the Administration and to such requirements as it may from time to time prescribe, apply the payments certified to him on behalf of a beneficiary only for the use and benefit of such beneficiary in the manner and for the purposes determined by him to be in the beneficiary's best interest.

§ 404.1604 Use of benefits for current maintenance.

Payments certified to a relative or other person on behalf of a beneficiary shall be considered as having been applied for the use and benefit of the beneficiary when they are used for the beneficiary's current maintenance—i.e., to replace current income lost because of the disability, retirement, or death of the insured individual. Where a beneficiary is receiving care in an institution (see § 404.1606), current maintenance shall include the customary charges made by the institution to individuals it provides with care and services like those it provides the beneficiary and charges made for current and foreseeable needs of the beneficiary which are not met by the institution.

§ 404.1605 Conservation and investment of payments.

Payments certified to a relative or other person on behalf of a beneficiary which are not needed for the current maintenance of the beneficiary except as they may be used pursuant to § 404.1607, shall be conserved or invested on the beneficiary's behalf. Preferred investments are U.S. Savings Bonds, but such funds may also be invested in accordance with the rules applicable to investment of trust estates by trustees. For example, surplus funds may be deposited in an interest or dividend bearing account in a bank or trust company or in a savings and loan association if the account is either federally insured or is otherwise insured in accordance with State law requirements. Surplus funds deposited in an interest or dividend bearing account in a bank or trust company or in a savings and loan association must be in a form of account which clearly shows that the representative payee has only a fiduciary, and not a personal, interest in the funds. The preferred forms of such accounts are as follows:

(Name of beneficiary)
by

---,
(Name of representative payee)
representative payee; or

(Name of beneficiary)
by

---,
(Name of representative payee)
trustee. U.S. Savings Bonds purchased with surplus funds by a representative payee for a minor should be registered as follows:

---;
(Name of beneficiary)

---, a minor, for whom
(Social Security No.)

--- is representative
(Name of payee)
payee for social security benefits.

U.S. Savings Bonds purchased with surplus funds by a representative payee for an incapacitated adult beneficiary should be registered as follows:

---,
(Name of beneficiary)

---, for whom
(Social Security No.)

--- is rep-
(Name of payee)
resentative payee for social security benefits.

A representative payee who is the legally appointed guardian or fiduciary of the beneficiary may also register U.S. Savings Bonds purchased with funds from title II payments in accordance with applicable regulations of the U.S. Treasury Department (31 CFR 315.5 through 315.6). Any other approved investment of the beneficiary's funds made by the representative payee must clearly show that the payee holds the property in trust for the beneficiary.

[37 F.R. 7381, Apr. 21, 1972]

§ 404.1606 Use of benefits for beneficiary in institution.

Where a beneficiary is confined in a Federal, State or private institution because of mental or physical incapacity, the relative or other person to whom payments are certified on behalf of the beneficiary shall give highest priority to expenditure of the payments for the current maintenance needs of the beneficiary, including the customary charges made by the institution (see § 404.1604) in providing care and maintenance. It is considered in the best interests of the beneficiary for the relative or other person to whom payments are certified on the beneficiary's behalf to allocate expenditure of the payments so certified in a manner which will facilitate the beneficiary's earliest possible rehabilitation or release from the institution or which otherwise will help him live as normal a life as practicable in the institutional environment.

§ 404.1607 Support of legally dependent spouse, child, or parent.

If current maintenance needs of a beneficiary are being reasonably met, a relative or other person to whom payments are certified as representative payee on behalf of the beneficiary may use part of the payments so certified for the support of the legally dependent spouse, a legally dependent child or a legally dependent parent of the beneficiary.

[31 F.R. 3894, Mar. 4, 1966]

§ 404.1608 Claims of creditors.

A relative or other person to whom payments under Title II of the Act are certified as representative payee on behalf of a beneficiary may not be required to use such payments to discharge an indebtedness of the beneficiary which was incurred before the first month for which payments are certified to a relative or other person on the beneficiary's behalf. In no case, however, may such payee use such payments to discharge such indebtedness of the beneficiary unless the current and reasonably foreseeable future needs of the beneficiary are otherwise provided for.

[28 F.R. 7182, July 12, 1963]

§ 404.1609 Accountability.

A relative or other person to whom payments are certified as representative payee on behalf of a beneficiary shall submit a written report in such form and at such times as the Administration may require, accounting for the payments certified to him on behalf of the beneficiary unless such payee is a court-appointed fiduciary and, as such, is required to make an annual accounting to the court, in which case a true copy of each such account filed with the court may be submitted in lieu of the accounting form prescribed by the Administration. If any such relative or other person fails to submit the required accounting within a reasonable period of time after it is requested, no further payments shall be certified to him on behalf of the beneficiary unless for good cause shown, the default of such relative or other person is excused by the Administration, and the required accounting is thereafter submitted.

§ 404.1610 Transfer of accumulated benefit payments.

A representative payee who has conserved or invested funds from Title II payments certified to him on behalf of a beneficiary shall, upon direction of the Administration, transfer any such funds (including interest earned from investment of such funds) to a successor payee appointed by the Administration, or, at the option of the Administration, shall transfer such funds, including interest, to the Administration for recertification to a successor payee or to the beneficiary.

[23 F.R. 7183, July 12, 1963]

20 C.F.R. Sections 404.908 through 404.934 provide:

§ 404.908 Effect of initial determination.

The initial determination shall be final and binding upon the party or parties to such determination unless it is reconsidered in accordance with §§ 404.910-404.916, or it is revised in accordance with § 404.956.

§ 404.909 Reconsideration and hearing.

Any party who is dissatisfied with an initial determination may request that the Administration reconsider such determination, as provided in § 404.910. If a request for reconsideration is filed, such action shall not constitute a waiver of the right to a hearing subsequent to such reconsideration if the party requesting such reconsideration is dissatisfied with the determination of the Administration made on such reconsideration; and a request for a hearing may thereafter be filed, as is provided in § 404.917.

[25 F.R. 1977, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.910 Reconsideration; right to reconsideration.

The Administration shall reconsider an initial determination if a written request for reconsideration is filed, as provided in § 404.911, by or for the party to the initial determination (see § 404.905). The Administration shall also reconsider an initial determination (unless the determination is with respect to the revision of the Administration's earnings records) if a written request for reconsideration is filed, as provided in § 404.911, by an individual as a wife, widow, divorced wife, surviving divorced wife, surviving divorced mother, husband, widower, child, parent, individual alleging equitable entitlement to a lump sum, or representative of a decedent's estate, who makes a showing in writing that his or her rights with respect to monthly benefits, a lump sum, a period of disability, or entitlement to hospital or supplementary medical insurance benefits, may be prejudiced by such determination. The Administration shall also reconsider an initial determination relating to the revision of the Administration's record of the earnings (see § 404.905(g)) of a deceased individual if a written request for reconsideration is filed, as provided in § 404.911, by a person as a widow, divorced wife, surviving divorced wife, surviving divorced mother, widower, child, parent, an individual alleging equitable entitlement to a lump sum, or representative of the decedent's estate.

[31 F.R. 16706, Dec. 31, 1966]

§ 404.911 Time and place of filing request.

The request for reconsideration shall be made in writing and filed at an office of the Administration or, in the case of an individual in the Philippines, at the Veterans' Administration Regional Office in the Philippines or, in the case of an individual having 10 or more years of service in the railroad industry (see Subpart O of this Part 404) or of an individual entitled to an annuity on the basis of an award under the Railroad Retirement Act prior to October 30, 1951, who requests in writing reconsideration with respect to his application to establish a period of disability under section 216(i) of the act, at an office of the Railroad Retirement Board, within 6 months from the date of mailing notice of the initial determination, unless such time is extended as provided in § 404.612 or § 404.953.

[25 F.R. 6469, July 9, 1960, as amended at at 28 F.R. 14402, Dec. 31, 1963]

§ 404.912 Parties to the reconsideration.

The parties to the reconsideration shall be the person who was the party to the initial determination (see § 404.905), and any other person referred to in § 404.910 upon whose request the initial determination is reconsidered.

§ 404.913 Notice of reconsideration.

If the request for reconsideration is filed by a person other than the party to the initial determination, the Administration shall, before such reconsideration, mail a written notice to such party at his last known address, informing him that the initial determination is being reconsidered. In addition, the Administration shall give such party a reasonable opportunity to present such evidence and contentions as to fact or law as he may desire relative to the determination.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.914 Reconsidered determination.

The Administration shall, when a request for reconsideration has been filed, as provided in §§ 404.910 and 404.911, reconsider the initial determination in question and the findings upon which it was based; and upon the basis of the evidence considered in connection with the initial determination and whatever other evidence is submitted by the parties or is otherwise obtained, the Administration shall make a reconsidered determination affirming or revising, in whole or in part, the findings and determination in question.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 404.915 Notice of reconsidered determination.

Written notice of the reconsidered determination shall be mailed to the parties at their last known addresses. The reconsidered determination shall state the basis therefor and inform the parties of their right to a hearing (see § 404.917).

§ 404.916 Effect of reconsidered determination.

The reconsidered determination shall be final and binding upon all parties to the reconsideration unless a hearing is requested in accordance with § 404.918 and a decision rendered or unless such determination is revised in accordance with § 404.956.

§ 404.917 Hearing; right to hearing.

An individual has a right to a hearing about any matter designated in § 404.902 if:

(a) An initial determination and a reconsideration of the initial determination have been made by the Administration; and

(b) The individual is a party referred to in § 404.910 or § 404.920; and

(c) The individual has filed a written request for a hearing under the provisions described in § 404.918.

[31 F.R. 16706, Dec. 31, 1966]

§ 404.918 Time and place of filing request.

The request for hearing shall be made in writing and filed at an office of the Administration or, in the case of an individual in the Philippines, at the Veterans' Administration Regional Office in the Philippines, or with an Administrative Law Judge, or the Appeals Council, or, in the case of an individual having 10 or more years of service in the railroad industry (see Subpart O of this part) or of an individual entitled to an annuity on the basis of an award under the Railroad Retirement Act prior to October 30, 1951, who requests in writing a hearing with respect to his application to establish a period of disability under section 216(i) of the act, at an office of the Railroad Retirement Board. The request for hearing must be filed within 6 months after the date of mailing notice of the reconsidered determination to such individual, except where the time is extended as provided in § 404.612 or § 404.624.

[31 F.R. 6468, July 9, 1966, as amended at 33 F.R. 14492, Dec. 31, 1968]

§ 404.919 Parties to a hearing.

The parties to a hearing shall be the person or persons who were parties to the initial determination in question and the reconsideration. Any other individual may be made a party if such individual's rights with respect to monthly benefits, a lump sum, a period of disability, or entitlement to hospital insurance benefits or supplementary medical insurance benefits may be prejudiced by the decision, upon notice given to him by the Administrative Law Judge to appear at the hearing or otherwise present such evidence and contentions as to fact or law as he may desire in support of his interest.

[31 F.R. 16706, Dec. 31, 1966]

§ 404.920 Additional parties to the hearing.

The following individuals, in addition to those named in § 404.919, may also be parties to the hearing. Unless the hearing is with respect to the revision of an earnings record established and maintained by the Administration, a wife, widow, divorced wife, surviving divorced wife, surviving divorced mother, husband, widower, child, parent, individual alleging equitable entitlement to a lump sum, or representative of a decedent's estate, who makes a showing in writing that such individual's rights with respect to monthly benefits, a lump sum, a period of disability, or entitlement to hospital insurance benefits or supplementary medical insurance benefits may be prejudices by any decision that may be made, may be a party to the hearing. Where the hearing is with respect to the revision of an individual's earnings record, a widow, divorced wife, surviving divorced wife, surviving divorced mother, widower, child, parent, individual alleging equitable entitlement to a lump sum, or representative of the decedent's estate, may after his death, be made a party to the hearing upon filing a written notice of his or her desire to be a party.

[31 F.R. 16706, Dec. 31, 1966]

404.921 Administrative Law Judge.

The hearing provided for in this Subpart J shall, except as herein provided, be conducted by an Administrative Law Judge designated by the Director of the Bureau of Hearings and Appeals or his delegate. In an appropriate case, the Director may designate another Administrative Law Judge or a member or members of the Appeals Council to conduct a hearing, in which case the provisions of this Subpart J governing the conduct of a hearing by an Administrative Law Judge shall be applicable thereto.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 1037, Feb. 2, 1963]

§ 404.922 Disqualification of Administrative Law Judge.

No Administrative Law Judge shall conduct a hearing in a case in which he is prejudiced or partial with respect to any party, or where he has any interest in the matter pending for decision before him. Notice of any objection which a party may have to the Administrative Law Judge who will conduct the hearing, shall be made by such party at his earliest opportunity. The Administrative Law Judge shall consider such objection and shall, in his discretion, either proceed with the hearing or withdraw. If the Administrative Law Judge withdraws, another Administrative Law Judge shall be designated by the Director of the Bureau of Hearings and Appeals or his delegate to conduct the hearing. If the Administrative Law Judge does not withdraw, the objecting party may, after the hearing, present his objections to the Appeals Council, as provided in §§ 404.945–404.949, as reasons why the Administrative Law Judge's decision should be revised or a new hearing held before another Administrative Law Judge.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 1037, Feb. 2, 1963]

§ 404.923 Time and place of hearing.

The Administrative Law Judge shall fix a time and a place within the United States for the hearing, written notice of which, unless waived by a party, shall be mailed to the parties at their last known addresses or given to them by personal service, not less than 10 days prior to such time. As used in this section and in § 404.934, the United States means the 50 States, the District of Columbia, the Commonwealth of Puerto Rico, and the Virgin Islands. Written notice of the objections of any party to the time and place fixed for a hearing shall be filed by the objecting party with the Administrative Law Judge at the earliest practicable opportunity (before the time set for such hearing). Such notice shall state the reasons for the party's objection and his choice as to the time and place within the United States for the hearing. The Administrative Law Judge may, for good cause, fix a new time and/or place within the United States for the hearing.

[36 F.R. 13385, July 21, 1971]

§ 401.924 Hearing on new issues.

At any time after a request for hearing has been made, as provided in § 401.918, but prior to the mailing of notice of the decision, the Administrative Law Judge may, in his discretion, either on the application of a party or his own motion, in addition to the matters brought before him by the request for hearing, give notice that he will also consider any specified new issue (see § 404.905) whether pertinent to the same or a related matter, and whether arising subsequent to the request for hearing, which may affect the rights of such party even though the Administration has not made an initial and reconsidered determination with respect to such new issue: *Provided*, That notice of the time and place of the hearing on any new issue shall, unless waived, be given to the parties within the time and manner specified in § 404.923: *And provided further*, That the claim is not one within the jurisdiction of a State agency under a Federal-State agreement pursuant to section 221(b) of the act. Upon the giving of such notice, the Administrative Law Judge shall, except as otherwise provided, proceed to hearing on such new issue in the same manner as he would on an issue on which an initial and reconsidered determination has been made by the Administration and a hearing requested with respect thereto by a party entitled to such hearing.

[25 F.R. 1677, Feb. 26, 1960, as amended at 28 F.R. 14492, Dec. 31, 1963]

§ 401.925 Change of time and place for hearing.

The Administrative Law Judge may change the time and place for the hearing, either on his own motion or for good cause shown by a party. The Administrative Law Judge may adjourn or postpone the hearing, or he may reopen the hearing for the receipt of additional evidence at any time prior to the mailing of notice to the party of the decision in the case. Reasonable notice shall be given to the parties of any change in the time or place of hearing or of an adjournment or a reopening of the hearing.

§ 401.926 Subpoenas.

When reasonably necessary for the full presentation of a case, an Administrative Law Judge or a member of the Appeals Council, may, either upon his own motion or upon the request of a party, issue subpoenas for the attendance and testimony of witnesses and for the production of books, records, correspondence, papers or other documents which are relevant and material to any matter in issue at the hearing. Parties who desire the issuance of a subpoena shall, not less than 5 days prior to the time fixed for the hearing, file with the Administrative Law Judge or at a district office of the Administration a written request therefor, designating the witnesses or documents to be produced, and describing the address or location thereof with sufficient particularity to permit such witnesses or documents to be found. The request for a subpoena shall state the pertinent facts which the party expects to establish by such witness or document and whether such facts could be established by other evidence without the use of a subpoena. Subpoenas, as provided for above, shall be issued in the name of the Secretary of Health, Education and Welfare, and the Social Security Administration shall pay the cost of the issuance and the fees and mileage of any witness so subpoenaed, as provided in section 205(d) of the act.

[25 F.R. 1677, Feb. 23, 1960, as amended at 28 F.R. 14402, Dec. 31, 1963]

§ 401.927 Conduct of hearing.

Hearings shall be open to the parties and to such other persons as the Administrative Law Judge deems necessary and proper. The Administrative Law Judge shall inquire fully into the matters at issue and shall receive in evidence the testimony of witnesses and any documents which are relevant and material to such matters. If the Administrative Law Judge believes that there is relevant and material evidence available which has not been presented at the hearing the Administrative Law Judge may adjourn the hearing or, at any time prior to the mailing of notice of the decision, reopen the hearing for the receipt of such evidence. The order in which evidence and allegations shall be presented and the procedure at the hearing generally, except as these regulations otherwise expressly provide, shall be in the discretion of the Administrative Law Judge and of such nature as to afford the parties a reasonable opportunity for a fair hearing.

§ 404.928 Evidence.

Evidence may be received at the hearing even though inadmissible under rules of evidence applicable to court procedure, subject to the provisions of the regulations in this Subpart J limiting the time within which the Administration's earnings records may be revised and limiting their use as evidence (see §§ 404.804–404.806).

§ 404.929 Witnesses.

Witnesses at the hearing shall testify under oath or affirmation, unless they are excused by the Administrative Law Judge for cause. The Administrative Law Judge may examine the witnesses and shall allow the parties or their representatives to do so. If the Administrative Law Judge conducts the examination of a witness, he may allow the parties to suggest matters as to which they desire the witness to be questioned. If the Administrative Law Judge shall question the witness with respect to such matters if they are relevant and material to any issue pending for decision before him.

§ 404.930 Oral argument and written allegations.

The parties, upon their request, shall be allowed a reasonable time for the presentation of oral argument or for the filing of briefs or other written statements of allegations as to facts or law. Where there is more than one party to the hearing, copies of any brief or other written statement shall be filed in sufficient number that they may be made available to any party.

§ 404.931 Record of hearing.

A complete record of the proceedings at the hearing shall be made. The record shall be transcribed in any case which is certified to the Appeals Council without decision by the Administrative Law Judge (see §§ 404.939 and 404.942 to 404.944, inclusive), in any case where a court action is commenced against the Secretary (see § 404.951), or in any other case when directed by the Administrative Law Judge or the Appeals Council.

§ 404.932 Joint hearings.

When two or more hearings are to be held, and the same or substantially similar evidence is relevant and material to the matters in issue at each such hearing, the Administrative Law Judge may fix the same time and place for each hearing and conduct all such hearings jointly. Where joint hearings are held, a single record of the proceedings shall be made and the evidence introduced in one case may be considered as introduced in the others, and a separate or joint decision shall be made, as appropriate.

§ 404.933 Consolidated issues.

When one or more additional issues are raised by the Administrative Law Judge pursuant to § 404.924, such issues may, in the discretion of the Administrative Law Judge, be consolidated for hearing and decision with other issues pending before him upon the same request for a hearing, whether or not the same or substantially similar evidence is relevant and material to the matters in issue. A single decision may be made upon all such issues.

§ 404.934 Right to appear and present evidence.

(a) *General.* Any party to a hearing shall have the right to appear before the Administrative Law Judge, personally or by representative, and present evidence and contentions. If all parties are unwilling, unable, or waive their right to appear before the Administrative Law Judge, personally or by representative, it shall not be necessary for the Administrative Law Judge to conduct an oral hearing as provided in §§ 404.923 to 404.933, inclusive. A waiver of the right to appear and present evidence and allegations as to facts and law shall be made in writing and filed with the Administrative Law Judge. Such waiver may be withdrawn by a party at any time prior to the mailing of notice of the decision in the case. Even though all of the parties have filed a waiver of the right to appear and present evidence and contentions at a hearing before the Administrative Law Judge, the Administrative Law Judge may, nevertheless, give notice of a time and place and conduct a hearing as provided in §§ 404.923 to 404.933, inclusive, if he believes that the personal appearance and testimony of the party or parties would assist him to ascertain the facts in issue in the case.

(b) *Record as basis for decision.* Where all of the parties have waived their right to appear in person or through a representative and the Administrative Law Judge does not schedule an oral hearing, the decision shall be based on the record. Where a party residing outside the United States at a place not readily accessible to the United States does not indicate that he wishes to appear in person or through a representative before an Administrative Law Judge, and there are no other parties to the hearing who wish to appear, the Administrative Law Judge may decide the case on the record. In any case where the decision is to be based on the record, the Administrative Law Judge shall make a record of the relevant written evidence, including applications, written statements, certificates, affidavits, reports, and other documents which were considered in connection with the initial determination and reconsideration, and whatever additional relevant and material evidence the party or parties may present in writing for consideration by the Administrative Law Judge. Such documents shall be considered as all of the evidence in the case.

[36 F.R. 13565, July 21, 1971]

ADDENDUM

137-60-499 CEN. LIT. USA:MH

UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

No. 73-1784

ROBERT LEE DAWSON,

Appellant,

versus

CASPAR WEINBERGER,
Secretary of Health,
Education and Welfare,

Appellee.

Appeal from the United States District Court for the Western District of Virginia, at Roanoke. James C. Turk, District Judge.

Argued: January 9, 1974 Decided: February 14, 1974

Before CRAVEN, RUSSELL and FIELD, Circuit Judges.

Kenneth S. Bridgeman, Attorney for The Legal Aid Society of Roanoke Valley, for Appellant; E. Montgomery Tucker, Assistant United States Attorney, (Raleigh S. Hanes, Jr., United States Attorney, on brief) for Appellee.

Filed

PER CURIAM:

Section 205(j) of the Social Security Act, 42 U.S.C. § 405(j), provides:

> "When it appears to the Secretary that the interest of an applicant entitled to a payment would be served thereby, certification of payment may be made, regardless of the legal competency or incompetency of the individual entitled thereto, either for direct payment to such applicant, or for his use and benefit to a relative or some other person."

On September 25, 1972, the Secretary advised the plaintiff that disability payments to which he was entitled under the Act would be paid to Cary A. Moomaw as his representative under the authority of the above statutory provisions. Thereafter, on October 27, 1972, and prior to any payments to the representative payee, the plaintiff was notified of his right to ask for a reconsideration of that determination under the Departmental Regulations and to submit any additional information that he might desire. The plaintiff, instead of

exercising his right to reconsideration and a hearing under the Regulations,[1] filed this action in the district court seeking a declaratory judgment that the provisions of Section 405(j) and the Departmental Regulations incident thereto were unconstitutionally violative of due process in respect to the procedures for the payment of entitlements of a disabled person under the Act to a representative. In connection therewith the plaintiff requested that a three-judge court be convened. The district court refused to certify the request for a three-judge court and dismissed the petition on jurisdictional grounds as well as the absence of any violation of the plaintiff's constitutional rights under the procedures followed by the Secretary in carrying out the provisions of Section 405(j). From this action of the district court the plaintiff has appealed.

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1. Section 404.910, Social Security Regulations No. 4, 20 C.F.R. 404.910.

During oral argument in this Court counsel for the parties agreed that subsequent to the entry of the order of dismissal the plaintiff had been accorded a full hearing before an Administrative Law Judge on his request for reconsideration. As a result of such hearing, the Administrative Judge recommended that payments be made direct to the plaintiff instead of the designated representative, and that recommendation has been approved by the Secretary and payments are presently being made to the plaintiff. Under these circumstances, and without regard to any jurisdictional issue raised by the defendant and decided by the court below, we are of opinion that the challenged statute and regulations, as applied by the Secretary in this case, accord with due process and present no substantial constitutional issue requiring the convening of a three-judge court under 28 U. S. C. § 2282. Accordingly, we conclude that the district court committed no error

in dismissing the action.[2]

AFFIRMED

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2. See, Richardson v. Wright, 405 U. S. 208 (1972), and the discussion in the opinion of the district court on the constitutional issue.